The Rules Committee
Te Komiti mō ngā Tikanga Kooti

28 November 2022
Minutes 11/2022

Circular 1 of 2022

Minutes of Meeting of 28 November 2022

The meeting called by Agenda 11/22 (C 35 of 2022) convened at 10.00 am using the Microsoft Teams virtual meeting room facility.

Present (Remotely)

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Cooper, Special Purposes Appointee and incoming President of the Court of Appeal
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court
Hon Justice Cooke, Chair and Judge of the High Court
Hon Judge Taumaunu, Chief District Court Judge
His Honour Judge Kellar, District Court Judge
Ms Una Jagose KC, Solicitor-General
Ms Kate Davenport KC, outgoing Special Purposes Appointee and New Zealand Bar Association Past President
Ms Laura O'Gorman KC, Special Purposes Appointee and Barrister
Mr Jason McHerron, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice

In Attendance (Remotely)

Ms Fiona McDonald, Senior Advisor Ministry of Justice
Mr Karl Simpson, Deputy Chief Parliamentary Counsel
Ms Nicola Wills, Private Secretary to the Attorney-General
Ms Georgia Shen, Secretary to the Rules Committee
Ms Anna McTaggart, Clerk to the Rules Committee

Apologies

Hon David Parker MP, Attorney-General
Hon Justice Thomas, Chief High Court Judge
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General
Maria Dew KC, incoming Special Purposes Appointee and New Zealand Bar Association President

1. Preliminary

Apologies

The apologies of the Attorney-General, Justice Thomas, Alison Todd and Maria Dew KC were received and noted.

The Chair welcomed the new President of the Court of Appeal, Justice Cooper, to his first Rules Committee meeting.

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in C 34 of 2022 were received and adopted. The Clerk is to publish these on the Committee's website.

2. Improving Access to Civil Justice

The Chair noted the release of the Improving Access to Civil Justice Report. To enable the Committee to decide whether to run a pilot or to simply implement the recommendations relating to the rules of court, and because the High Court recommendations had changed substantially, the Committee has invited further submissions about the Rules Committee's proposals. Any submissions will be considered at the Rules Committee's first meeting in 2023 when the implementation of the recommendations in the report will be addressed.

3. Costs for lay-litigants

The Chair outlined the three issues. Firstly, cost awards for self-represented litigants. Secondly, costs awards for in-house solicitors. Thirdly, whether High Court r 14.2(1)(f) should be repealed or amended. The Committee had already made decisions on the first issue, and now needed to make decisions on the last two matters.

The Chair summarised the arguments in relation to the establishment of a new charge out rate for in-house lawyers, including Crown lawyers (including Crown Law). Una Jagose KC then explained the perspective from the Crown on such matters, supporting the view that costs should continue to be awarded to Crown lawyers and Crown Law under the existing costs regime on the existing basis.

The Committee agreed that simplicity and predictability are important factors underpinning the costs regime. There was general agreement that the rate previously decided by the Committee of $500 per day was an appropriate rate of costs for self-represented litigants. This would include lawyers who represent their personal interests in court (but does not include lawyers representing an employer in the context of a solicitor-client relationship).

The Committee discussed whether in-house lawyers should receive a different rate to externally employed lawyers. It was noted that this suggestion was intended to reflect the lower cost which typically result from utilising internal counsel rather than making any suggestion that in-house counsel do not have the same professional obligations as external counsel as had previously been raised. There were reasons both for and against awarding a different rate to in-house lawyers. It was observed that costs actually incurred by in-house lawyers can be quite different than those for

external solicitors. Members of the Committee had different views on whether a new separate rate should be established in those circumstances.

The Committee also debated whether r 14.2(1)(f) should be amended or repealed. Some members broadly supported its change. It was suggested that if parties can conduct litigation at reduced costs, there should be financial incentives to do so and that it would be easier to make costs standard and predictable. Daniel Kalderimis suggested that r 14.2(1)(f) could be softened by adding the word "normally" as in r 14.2(1)(d). Other members did not support the change. Justice Cooper and Judge Kellar both noted that the costs regime is predicated on costs being a reasonable contribution to the costs being incurred. Judge Kellar noted that anyone seeking costs has the ability under r 14.6 to seek increased and indemnity costs.

The Chair suggested that if a consensus could not be reached on the proposal to set a separate rate for in-house lawyers, or for changing or repealing r 14.2(1)(f), it would be best to leave the rules as they are, with the exception of allowing self-represented litigants to recover $500 per day in accordance with the Committee's previous decisions. The Committee agreed.

The question of whether Community Law solicitors or other lawyers conducting pro bono work should be able to recover costs was then raised. It was noted that contingency fee arrangements were permitted by r 14.2(2). The Committee decided that Community Law should be consulted in order for the Committee to better understand the issue raised by Community Law.

It was agreed that $500 per day was an appropriate recovery rate for self-represented litigants and that the rules should allow this notwithstanding r 14.2(1)(f). The definition of self-represented litigants should not include those appearing in the context of a solicitor-client relationship, including Crown lawyers. PCO should be asked to prepare draft rules accordingly.

The Committee agreed not to change r 14.2(1)(f) and that there would be no change to the rules to create a new rate for in-house lawyers.

It was agreed that Judge Kellar and Maria Dew KC (on behalf of the Bar Association) should make inquiries about Community Law and pro bono work and report back to the Committee.

4. Items from Ministry of Justice

Possible amendment of Rule 11 of District Court and Senior Courts (Access to Court Documents Rules) 2017

Mr Chhana noted that in late 2021, the Ministry of Justice became aware of concerns that the names and addresses of people requesting access to court documents were being provided to parties to the relevant proceedings, or to their lawyers, without the requesters being aware that this may happen. He noted that the Ministry of Justice had made changes to forms and processes to deal with the immediate issue. He asked the Committee to consider whether r 11 should be amended so as not to require the name and address of a requester to be provided to the parties to proceedings in every case, or whether to allow requesters the opportunity to request confidentiality of their name and residential address.

Ms O'Gorman noted that it may be important to provide the requester's name in some cases, in order to determine whether they have proper reason to request access to certain court documents.

The Chief Justice queried why any obligation to give addresses to the parties was needed because addresses are increasingly regarded as private information. Mr Chhana agreed to investigate this query.

The Committee agreed to put forward an option allowing judges to make confidentiality orders if required as proposed in the Ministry's paper for the Committee (C36 of 2022). Mr Chhana agreed to report back to the Committee with a draft.

Requested amendment to Supreme Court Rules 2004

Mr Chhana spoke to C37 of 2022. In 2018, a new rule 5A was inserted into the Court of Appeal (Civil) Rules 2004 which enables the Registrar to refuse documents for filing where documents are non-compliant, patently abusive, or where the court lacks jurisdiction. The rule also provides the Registrar with limited power to extend the time for complying with any rule, direction or order of the court. Mr Chhana proposed that a new rule 5A, identical to that in the Court of Appeal (Civil) Rules is inserted into the Supreme Court Rules 2004.

The Committee unanimously agreed.

5. Te Reo Māori in Courts

Mr Chhana spoke to C38 of 2022 and provided an update on the judicial review in relation to the use of te reo Māori in the courts. The case is adjourned until early next year. There are to be further discussions with the claimants. This overlaps with work being undertaken by the subcommittee formed during the 29 November 2021 meeting, to determine the Committee's response to Te Hunga Rōia Māori o Aotearoa's submission on the use of te reo Māori in courts. It was suggested that the subcommittee consider issues emerging from litigation.

Mr McHerron recommended that a judicial member be appointed to the subcommittee. It was agreed that the Chief High Court Judge would nominate a member of the judiciary after consulting with the Chief District Court Judge.

Mr McHerron discussed his memorandum to the Committee (C 39 of 2022) which outlined proposed interim amendments by Te Hunga Rōia Māori o Aotearoa to the High Court Rules 2016. He suggested that there are issues with the Rules which should be amended immediately, ahead of more substantive reform – as a signal in the right direction:

(a) Rule 1.11(5) which prescribes 10 working days' notice of intention to speak te reo Māori must be given should be revoked and replaced with a requirement in r 1.11(2) to give notice "as soon as is reasonably practicable" before any conference or hearing at which a person intends to speak te reo Māori.

(b) Rule 1.11(4) should be softened to provide that the use of form G 12 is optional, and that notice can be given informally, for example by email to the case manager and other parties.

(c) Rules 1.12 and 1.14 (translation of documents into te reo Māori) should be merged into a single rule and amended to provide that a Judge may (on their own initiative or on the application of a party, including an informal application) order a translation of a document from Māori to English or vice versa, at the expense of the Ministry of Justice. There should be no need to prove inability to read the document in either language.

(d) Rule 1.13(b) (failure to comply with r 1.11 a relevant factor in an award of costs) should be revoked.

The Chief Justice noted her general support for amending the Rules, especially in relation to recommendations (b), (c) and (d) but noted that 10 working days' might be considered a prompt turn around considering time is needed to process requests and arrange translation services. It is important to maintain the operability of the courts and it is not in anybody's interest if proceedings mut be adjourned because notice has not been given. The Chair agreed that it might not be possible to arrange translation services within less than 10 working days.

Ms McDonald, Senior Advisor at Ministry of Justice noted that finding interpreters can sometimes be difficult due to availability, conflicts of interest and skill level. She noted that Ministry of Justice is taking steps to increase interpretation capabilities. She also noted that when less than 10 working days' notice is given, every effort would be made to find a translation, whether the request involves te reo or any other language. Ms McDonald also noted that the Māori Language Commission was running a work programme to recruit and train people who speak te reo as interpreters.

Justice Muir expressed concern, particularly in regard to proposal (c). He noted that there should be guidelines for judges about when a translation request might legitimately be rejected and noted the possibility that judges may be left open to criticism if such guidelines are not determined. He suggested that this issue should be the subject of comprehensive consideration. He also noted that he did not support proposal (d). The Committee agreed that these concerns would be noted in the Minutes.

Ms O'Gorman suggested that some of the wording of r 1.11(5) could be amended to reflect that its purpose is not to require notice that te reo will be spoken in court, rather it is to provide notice that a translation service will be required so that an appropriate translator can be organised, and all court participants are able to engage with the proceedings. Organising translation services involves logistical issues which will require a certain period of time to resolve, and the Rules should clarify this. It was agreed that this was a more sophisticated change which would require further thought and consideration.

The Chair suggested that in the meantime, the Committee adopt proposals (b), (c) and (d).

The Committee agreed with the proposal that the subcommittee consider issues emerging from litigation.

The Committee agreed that a judicial member would be appointed to the subcommittee. The Chief High Court Judge would nominate an appointee after consulting with the Chief District Court Judge.

The Committee agreed to adopt suggestions (b), (c) and (d) of C39 of 2022 and agreed to note Justice Muir's disagreement with the adoption of suggestion (c) in particular.

6. Matters relating to the District Court

Electronic filing

The Committee had agreed, over email after the cancellation of the Committee's October meeting, to amend the District Court Rules to permit electronic filing after the expiring of the Epidemic Notice. The Chair noted that the Parliamentary Counsel Office's (PCO) draft Amendment Rules went somewhat further than what the Committee agreed to. The Chair drew the Committee's attention to his memorandum (C 40 of 2022) which outlined changes to the Amendment Rules suggested after discussions with Judge Kellar. The Chair asked the Committee whether there were any objections to the recommended Rule changes.

It was noted that there was some urgency to passing the Amendment Rules as there had been reports that some registries had not continued to accept electronically filed documents as hoped.

The Committee approved the amendments suggested by the Chair in C40 of 2022 and agreed that PCO should proceed to draft District Court (Electronic Filing) Amendment Rules 2022) adopting these changes as soon as possible.

Update on amendment to District Court Rules 2014

PCO provided an update on the Committee's questions from the June 2022 meeting. It was noted while PCO could make editorial changes under s 87 of the Legislation Act 2019, but that the planned amendments would need to go through the usual Rules Committee concurrence process as they went beyond editorial changes.

The Committee recorded its unanimous support for PCO to utilise their editorial powers under s 87 in future instances where it was appropriate to do so.

7. Matters or noting

The Chair thanked Ms Davenport KC for her time on the Committee, noting the coincidence that they both started their time on the Rules Committee at the same meeting. He noted her significant contributions, particularly in relation to the access to civil justice consultation process, including as a member of the first subcommittee. The Chief Justice observed that Ms Davenport KC had brought a level of passion to the access to justice work which spurred the Committee on through the two-year journey leading up to the Report. The Chief Justice also congratulated the Committee, and in particular the Chair, for the hard work and dedication which went into producing the Report.

It was noted that Maria Dew KC would be replacing Ms Davenport KC on the Rules Committee.

Justice Francis Cooke
Chair